

Pro Se

Vol. 17, No. 4; Fall 2007 Published by Prisoners' Legal Services of New York

SENTENCE REFORM COMMISSION CALLS FOR DETERMINATE SENTENCES; PUTS OFF FURTHER DRUG LAW REFORM DISCUSSION

In a preliminary report issued in October, the New York State Commission on Sentencing Reform called for determinate sentencing, increased educational opportunities in prison, and increased use of “graduated sanctions” for parole violators. The Commission, which was charged with making recommendations for reform of New York’s complex sentencing laws, failed, however, to recommend further reform the harsh Rockefeller era drug laws, as it was widely expected to do. It said it was still studying the matter.

The principal recommendations of the preliminary report included:

◆ Abandoning indeterminate sentences, with limited exceptions, and moving to an all-determinate sentencing system. Currently, New York uses both indeterminate and determinate sentences. Under this “hybrid” sentencing structure, the Commission found, defendants, crime victims, and even judges often leave the courtroom with only a general understanding of how long an offender will actually spend behind bars. A determinate sentencing structure, it found, would bring greater fairness and uniformity to sentences.

◆ Modifying New York’s sentencing statutes to permit a court to sentence certain non-violent, drug-addicted felony offenders to community-based treatment, in lieu of state prison, when the judge, prosecutor, and defendant all agree that this is a just outcome. Under current law, a prison term is required for many drug felonies.

...article continued on Page 3

Also Inside...

**Deferring Payment of
Mandatory Fees page 18**

**Second Circuit Offers Primer
on Deliberate Indifference . . . page 19**

**Maximizing Chances For Early
Release: The Earned Eligibility
Certificate and Related
Programs page 23**

Subscribe to Pro Se! See back page for details

This project is supported in part by grants from the New York State Division of Criminal Justice Services, the New York State Bar Foundation, and the Tompkins County Bar Association. Points of view in this document are those of the author and do not represent the official position or policies of the grantors.

Cut Programs to Meet a Fiscal Crunch? No. Expand Them.

A Letter from Susan Johnson, Executive Director

New York is, again, facing a fiscal crisis. Historically, when states are faced with fiscal problems, their first reaction is to ask state agencies to cut programs. This has been the pattern in New York. Commissioners are told that they must cut their budgets to help balance the budget, and they do. Furthermore, if history is a guide, when DOCS is asked to cut its budget, the first thing to go will be programs. Why? Because if you don't cut programs, you are going to have to cut something else and that something else is usually security. Most believe that cutting security costs is a controversial, and possibly dangerous, choice to make. But is it?

The Correctional Association of New York, in its *State of the Prisons: 2002-2003* Report, found that "superintendents, correction officers, and inmates cite program cuts and idleness as the leading problems in their facilities." Thus, cutting programs may actually hinder DOCS from achieving its primary goal, security. So, let's step back for a minute and think about what could happen if we changed the paradigm. As counterintuitive as it may seem, maybe the response to a state's fiscal crisis is not to cut but to add programs.

Currently, in New York State, the Sentencing Reform Commission is working on recommendations to improve our criminal justice system. In its Preliminary Report, the Commission notes that alternatives to incarceration ("ATIs") are "critical to the diversion of offenders from prison and the avoidance of re-incarceration after a parole rule violation." The Report focuses on the need to support for those programs that are found to be effective.

Imagine that, in its final report, the Commission acknowledges the success of our current Adult Drug Courts and Mental Health Courts, which divert certain low level offenders with drug and mental health problems from DOCS, and recommends that these programs and other innovative ATIs be expanded. Imagine that, in response, funding for such programs is appropriated by the Legislature and approved by the Governor, and a sufficient number of alternative treatment courts and other ATIs are opened across the state. What would the budget implications be?

A study done in 2006 by the Washington State Institute for Public Policy is informative. The Institute was directed by the State Legislature to report on whether evidence-based and cost-beneficial program options existed to reduce the need for future prison beds, save money, and reduce recidivism. The Institute exhaustively reviewed all research evidence that it could locate in searching for what works, if anything, to reduce crime. In analyzing 57 evaluations of the effectiveness of adult drug courts across the nation, the study found that average adult drug court programs reduce the recidivism rate of participants by 8.0 percent. A similar cost-benefit analysis of adult drug programs found that the use of adult drug courts typically results in an economic benefit of almost \$5,000.00 per participant.

Currently, in New York State, we have 171 drug courts and another 25 in the planning stages. We also have 10 mental health courts with two additional courts scheduled to open soon. In 2006, there were 16,799 new commitments to New York State's prisons and

over 6,000 of those were for drug offenses. Eleven percent of current state prisoners are on the mental health caseload and at least 3,500 inmates are classified as having major mental disorders.

If we had the ability to divert some or most of these individuals to drug or mental health courts, the State would save millions. It is quite possible that the result would be that Commissioner Fisher would not only *not* have to cut his agency’s budget but, due to the decrease in the prison population, there would be more in-prison programming opportunities for those who are incarcerated.

A similar argument could be made with respect to education. In 1995, the New York Legislature voted to change the existing laws and prohibit prisoners from receiving New York

State Tuition Assistance Program (“TAP”) grants. At the same time, the Federal government similarly prohibited Federal Pell Grants to prisoners. The combined result of these changes effectively terminated all college programs in DOCS. And yet, historically, studies had shown that, in New York, only 26.4% of the inmates who earned a degree returned to prison, compared to 44.6% of those who participated in the college program but did not complete a degree. Studies conducted by states across the U.S. have shown the recidivism rate of prisoners to be inversely proportional to their level of education.

PLS is working hard to ensure that, at least with respect to funding for in-prison programs, history does not repeat itself.



...article continued from Page 1

◆ Using valid evidence-based practices to guide decision making and programming. The Commission noted that over 30 years of research exists that identifies crucial components of effective and successful correctional and community interventions and programs. These studies are commonly referred to as “evidence-based practices.” The Commission recommended that New York review this body of research and develop our institutional and community programming based upon “scientifically validated, evidence-based practices.”

◆ Using “graduated sanctions,” such as curfews, home confinement, electronic monitoring, and re-entry courts, to help end the “revolving door” of incarceration for certain offenders under parole supervision who violate one or more conditions of parole but commit no new crime. The committee found that, currently, a large number of parolees are returned to state prison on technical parole violations and that, in many cases, there were better and more cost-effective community based alternatives.

- ◆ Expanding prison-based educational and vocational training programs and work-release, enhancing employment and housing opportunities for ex-convicts, and “utiliz[ing] other cost-effective measures designed to reduce recidivism and increase public safety.”
- ◆ Establishing a permanent sentencing commission in New York to serve as an advisory board to both the Legislative and Executive branches.

As noted, however, the Commission failed to address further reform of the so-called Rockefeller Drug Laws. According to many advocates, the limited drug law reforms of 2004 and 2005, which reduced the sentences that most drug offenders can expect to receive and provided an opportunity for inmates convicted of A-1 drug offenses and some inmates convicted of A-II offenses prior the reform to apply for a reduced sentence, did not go far enough. They note that reform has not touched B drug offenders sentenced before the reform laws were passed, and that many other aspects of the Rockefeller era drug laws, including mandatory prison terms for many first time drug offenders, as well as mandatory prison for non-violent second felony offenders, remain in place. It was widely expected that the Commission would recommend further reform.

The Commission noted that it had heard conflicting views on the merits and de-merits of the Rockefeller era laws. Prosecutors maintained that they encourage cooperation in the prosecution of higher ups in drug organizations and provide a strong incentive for drug-addicted offenders to participate in DOCS’ treatment programs, such as Willard and CASAT.

Advocates of further drug reform pointed out that there were more annual admissions of

drug offenders into State prison in the past two years, after the reform, than in the years immediately preceding the reform. Moreover, they noted, thousands of persons sentenced under the former drug laws, including many A-II drug offenders and all B drug offenders, remain ineligible to seek re-sentencing.

The Commission report stated that “it will be challenging to reconcile these competing views” and stated that it intends to further study the impact of the 2004 and 2005 reform measures as well as proposals for additional sentencing reform before issuing its final report.

With respect to reforming New York sentencing laws more broadly, as noted above, the Commission came down strongly in favor of moving to a determinate sentencing scheme for almost all offenses. In doing so, the Commission criticized the uncertainty inherent in indeterminate sentences, in which the Parole Board’s subjective judgment is often the principal factor in determining when an inmate will be released. Under the current system, the Commission noted, a person serving an indeterminate sentence may have up to five potential release dates: a supplemental merit eligibility date for most drug offenses; a merit eligibility date; a parole eligibility date; a conditional release date; and a maximum expiration date.

Determinate sentencing, on the other hand,

allows the parties to leave the courtroom with a greater understanding of the length of the sentence...and, by eliminating entirely the subjective assessments and release decisions of an intervening parole...reduces the possibility that like offenders will be treated differently with regard to time actually served, thereby promoting greater fairness.

“Understandably,” wrote the Commission, “many defendants reportedly prefer the certainty of determinate sentences to the vagaries of the parole process.”

In addition, the Commission stated, the Parole Board “has achieved only mixed results” in determining when a person should be released, citing the following statistic: for non-violent felony offenders released from DOCS in 2004, the percentage who returned to prison within 24 months was virtually the same for those released following their first parole hearing (38.2%) as those denied initial release and then released following their second or subsequent hearing (38.6%).

The Commission recommended retaining indeterminate sentences only for the most egregious sentences which now require maximum terms of life, such as non-drug A-I and A-II offenses and persistent felony offender sentences. It identified two reasons for this. First, the Commission found, there are some instances in which early release is appropriate for inmates serving long sentences for very serious crimes (*e.g.*, where an inmate is serving a life sentence for a crime committed at a young age who is determined by the Parole Board to not longer pose a threat to others). In those cases, the Commission found, an inmate should have an opportunity to go before a Parole Board and present a case for release. Second, the possibility that an inmate serving a life sentence may be granted release on parole provides a strong incentive for good behavior.

The Commission held additional hearings in November in New York City, Albany, and Buffalo. PLS testified at the hearing in Buffalo. The Sentencing Commission is expected to produce a final report in the Spring.

Copies of the full preliminary report have been made available to DOCS and should be available in all prison libraries. The report is also available online at:

<http://www.criminaljustice.state.ny.us/legalservices/sentencingreform.htm>.

News and Briefs

Courts Split on Eligibility Requirements for Re-Sentencing of A-II Drug Offenders

The Drug Law Reform Act of 2005 was intended to allow certain A-II drug offenders sentenced under the harsh Rockefeller Drug Laws apply to be re-sentenced to new, lesser, determinate sentences. The Act, however, imposed several stringent eligibility requirements, among them: in order to be eligible for re-sentencing, the offender must meet “the eligibility requirements” for merit time.

This requirements has raised the question: What are the eligibility requirements for merit time?

Merit time is governed by Correction Law § 803(1)(d). Nowhere in that statute is the term “eligibility requirements,” or any similar expression, used. Instead, subsection (i) of the statute states that all inmates serving indeterminate terms (as well as certain inmates serving determinate terms) may “earn” merit time. Subsection (ii) states that merit time “shall not be available” to inmates convicted of certain specified offenses, including violent offenses. And subsection (iv) states that merit time “may” be “granted” when an inmate “successfully participates” in an assigned “work and treatment program” and “obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate...or performs at least four hundred hours of service as part of a community work crew” and “shall be withheld for any serious disciplinary infraction”--or upon a judicial determination that the defendant, while an

inmate, commenced a frivolous lawsuit, proceeding, or claim against a state agency, officer, or employee.

In People v. Sanders, 829 N.Y.S.2d 187 (2d Dep't 2007), the Second Department of the State Appellate Division held last winter that the "eligibility requirements" for merit time--and, thus, for re-sentencing--included only those requirements outlined in subsections (i) and (ii) of Correction Law § 803(1)(d).

In other words, the court held, an inmate who is serving an indeterminate sentence, and who has not been convicted of one of the offenses specified in subsection (ii) of the statute, is "eligible" for merit time. Whether DOCS has actually granted or "withheld" the time, under the criteria listed in subsection (iv), is irrelevant as to whether the inmate is "eligible" in the first place. The contrary argument, the court found, would allow DOCS, rather than the courts, to decide which A-II offenders were eligible for re-sentencing, simply by deciding who did and did not receive merit time.

Nonsense, held the First Department of the Appellate Division this Summer, in People v. Paniagua, 841 N.Y.S.2d 506 (1st Dep't 2007). Subsection (iv) of Correction Law § 803(1)(d) specifically provides that to obtain a merit time allowance, an inmate must not have committed a "serious disciplinary infraction." Not having a serious disciplinary infraction may, therefore, "fairly be concluded [an] eligibility requirement" for obtaining merit time.

The argument in Sanders that this interpretation grants DOCS the authority to decide which A-II offenders will be eligible for re-sentencing, the Paniagua court continued,

overlooks the fact that the Legislature...could have reasonably decided to deny re-sentencing to individuals who had not met the

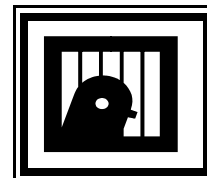
requirements for being granted merit time. An inmate's failure to meet those requirements and, in particular, his repeated commission of serious acts of insubordination while incarcerated, can only be viewed adversely in considering his likelihood of re-adjusting to life outside of prison.

Practice pointers: *The Paniagua decision means that there is now a split between the First and Second Departments over which A-II drug offenders will be eligible for re-sentencing. In the First Department (which covers courts in Manhattan and the Bronx), offenders who have either been convicted of a "serious" disciplinary infraction or have not completed the program requirements for merit time are ineligible for re-sentencing. In the Second Department (which covers courts in Brooklyn, Queens, Long Island, and Southern New York), such offenders are eligible for re-sentencing (so long as they also meet the additional eligibility criteria in the Drug Law Reform Act of 2005.)*

The additional eligibility criteria for re-sentencing under the Act are: that the offender be committed prior to October 29, 2005; that he be sentenced to a minimum term of at least three years; and that he be more than three years from a parole eligibility date.

DOCS considers a "serious" disciplinary infraction to be any misbehavior which results in "60 or more days of SHU and/or keeplock time" or "receipt of any recommended loss of good time as a disciplinary sanction."

See 7 NYCRR § 280.2(b).



Federal Cases***Court Rejects Brutality Claim; Finds Inmate Failed to Exhaust Administrative Remedies***

Wilkinson v. Banks, 2007 WL 2693636, W.D.N.Y., September 10, 2007 (NO. 02-CV-361) (Unreported Decision)

The Prison Litigation Reform Act (“PLRA”) of 1995 requires inmates to exhaust their administrative remedies before filing a claim involving prison conditions in federal court. In Woodford v. Ngo, ___ U.S. ___ 126 S.Ct. 2378 (2006), the Supreme Court held that exhaustion under the PLRA means “proper exhaustion”, which, in turn, means using all the grievance steps a prison administration holds out “and doing so properly.” In that case, the court found that a prisoner who had filed a late grievance had not exhausted his administrative remedies, even though he properly appealed the prison system’s decision that the grievance was late.

Woodford did not, however, overrule a 2004 decision from the Second Circuit Court of Appeals which established some exceptions to the exhaustion rule. In Hemphill v. New York, 380 F.3d 680 (2d Cir 2004), the court held the failure to properly exhaust may be excused if the grievance process was not “available” to the prisoner, or if the Defendant’s own actions--such as threatening retaliation--inhibited or prevented the inmate from using it, or if other “special circumstances” could plausibly justify the prisoner’s “failure to comply with [the] administrative procedural requirements.”

In this case, the Plaintiff, Darrell Wilkinson, alleged that he was assaulted by several Correction Officers in an exercise pen at Southport in May of 1999. He did not file a grievance about the assault until July of 2001, after he had been transferred out of Southport.

On July 17, the Superintendent of the facility where he filed the grievance (Elmira) rejected it on the grounds that it was untimely. The form on which the Superintendent rejected the grievance contained a pre-printed notice at the bottom entitled “Appeal Statement,” which advised Wilkinson that if he wished to “refer” the Superintendent’s decision, he must sign the document and return it to the Inmate Grievance Clerk. It further advised that he must file his appeal within four working days from receipt of “this notice.”

On July 30, 2001, Wilkinson sent his appeal directly to the Central Office Review Committee (“CORC”). On August 9, 2001, Thomas Eagen, Director of the Inmate Grievance Program, wrote to Wilkinson, returning his appeal. The letter explained, “[DOCS’s] policy, Directive # 4040, Inmate Grievance Program (“IGP”), provides inmates with an orderly, fair and simple method of resolving grievances pursuant to the Correction Law. The directive makes no provision for an inmate to refer grievances directly to [CORC].” Wilkinson filed his lawsuit one year later, on May 16, 2002.

Under these facts, the court concluded that Wilkinson had failed to exhaust his administrative remedies.

As an initial matter, the court found that the two-year delay in filing the grievance did not make it untimely. This is because, during much of that period, the law in Second Circuit did not require exhaustion of administrative remedies for prisoner claims of assault or excessive force, on the grounds that such claims did not involve prison “conditions.” It was not until May of 2001 that the Supreme Court decided, in Booth v. Churner, 532 U.S. 731, that the exhaustion requirement applied to excessive force claims. Under the circumstances, the court agreed with Wilkinson that his grievance, filed within four weeks of Booth, should be considered timely.

The court also found that it could not conclude that his appeal to CORC was untimely. Although the appeal was not submitted until July 30, 2001--13 days after the Superintendent denied the grievance--the record did not establish when Wilkinson received the denial. It was thus impossible to determine whether his appeal was untimely.

The court, nevertheless, found that Wilkinson's decision to send his appeal directly to CORC, rather than to file it with the Inmate Grievance Clerk, was a procedural error.

Wilkinson argued that, if so, the error should be excused, because the instructions that he received regarding appealing were unclear and confusing. Specifically, he argued, they seemed to indicate he had two options available: first, to "refer" the Superintendent's decision by returning the form to the Inmate Grievance Clerk; and second, to appeal to CORC within four days of the receipt of the form. As to the second option, he argued, the instructions did not obligate him to file his appeal with the Clerk, rather than to forward it directly to CORC, as he did.

The court disagreed. In Hemphill, the court noted, the Second Circuit held that one of the "special circumstances" that may excuse a failure to properly exhaust administrative remedies is a prisoner's reliance on a reasonable, if ultimately incorrect, interpretation of prison grievance regulations. Here, however, the court found that Wilkinson's belief that he could file his appeal directly with CORC was not a reasonable interpretation of the rules.

First, the court held, "the belief that DOCS rules afforded a prisoner dissatisfied with a Superintendent's grievance decision two separate avenues of review is belied by the heading placed directly above the instructions" that Wilkinson received. That heading stated "Appeal Statement," and provided room for Wilkinson to write a response to the decision. It

did not, according to the court, suggest two options, *i.e.*, appeal or referral.

Moreover, the court continued, Wilkinson's interpretation "makes little sense." "Only by taking the instructions as a whole," the court wrote, "and reading them to refer to a prisoner's right to appeal to CORC, do they make sense."

Read together in this manner, the instructions identify the body by whom review may be sought (CORC), the manner in which review may be sought (by forwarding the form to the Inmate Grievance Clerk) and the deadline by which review may be sought (four days from receipt of the Superintendent's decision).

Since Wilkinson had failed to "properly" exhaust his grievance, and since he had no "reasonable" excuse for his failure, the court dismissed his claim.

Practice pointer: *This case turns on what appears to be a minor technicality: Wilkinson sent his appeal directly to CORC, rather than filing it with the IGRC clerk. However, that was enough for the court to conclude that he had failed to exhaust his administrative remedies--and bar him from court. Cases such as this should serve as a reminder to inmate-litigants of the importance not only of exhausting administrative remedies, but of doing so "properly."*

The Plaintiff in this case was represented by Prisoners' Legal Services.



State Cases

Disciplinary Cases

Inmate Found Not Guilty of Refusing To Double Bunk, Guilty of Refusing to Obey Direct Order

Matter of Amaker v Selsky, 838 N.Y.S.2d 921 (3d Dep't 2007)

The Petitioner in this case refused to comply with a Correction Officer's order to move to a double-bunk cell. As a result, he was charged in a Misbehavior Report with refusing a direct order and refusing a double-bunk assignment. At the Tier III disciplinary hearing, the Hearing Officer reviewed certain paperwork and agreed that the Petitioner was not supposed to be housed in a double-bunk cell. Consequently, he was found not guilty of refusing a double-bunk assignment, but guilty of refusing a direct order. After the determination was affirmed on administrative appeal, the Petitioner commenced an Article 78 proceeding.

The court sustained the hearing, noting: the "Petitioner was not entitled to refuse to obey the order even if he felt that it was not authorized... His recourse was to file a grievance."



Minor Gaps in Hearing Transcript Did Not Preclude Review

Matter of Berry v. Goord, 837 N.Y.S.2d 880 (3d Dep't 2007)

The Petitioner was charged with creating a disturbance, harassment, assaulting staff, engaging in violent conduct, refusing a direct order, and interfering with an employee after allegedly becoming disruptive in his cell. Following a Tier III hearing, he was found guilty of all charges. After the determination was affirmed on administrative appeal, he commenced an Article 78 proceeding. He argued that the hearing transcript contained gaps which precluded meaningful review, and required that the hearing be reversed.

The court, after reviewing the hearing, disagreed. It found that the hearing transcript did not preclude meaningful judicial review. After reviewing the remainder of the Petitioner's claims, the court affirmed the hearing result.

Practice pointer: *Seven N.Y.C.R.R.254.6(a)(2) provides that the entirety of a Tier III hearing must be electronically recorded. Courts are reluctant to reverse disciplinary hearings, however, solely because certain portions of the hearing transcript may be unintelligible, so long as the deficiencies "are minor and sporadic and do not impede resolution of the other issues raised."* Wilson v. Coombe, 655 N.Y.S.2d 192 (3d Dep't 1997).

In Matter of Berrios v. Kuhlmann, 532 N.Y.S.2d 593 (3d Dep't 1988), the Hearing Officer held a two-minute, off-the-record conversation with an inmate regarding the unavailability of an employee witness and some confusion over the dates a urine sample had been taken. The inmate argued that the hearing had to be reversed because the conversation violated the rule that hearings must be recorded. The court disagreed, writing:

The purpose of [a] hearing record is to allow review by a higher authority. Since there was no dispute as to the content of the conversation, the issue of whether it was on the record is academic and the failure to record it at the time cannot be said to constitute reversible error. Furthermore, there was sufficient documentary evidence and testimony in the record which established the dates which the specimen was taken and the testing conducted. Thus, no prejudicial error occurred in this regard.

Courts will only reverse a disciplinary hearing on these grounds when the deficiencies in the transcript make it impossible to review the adequacy of the hearing or the issues raised in the appeal. For example, in Scott v. Coughlin, 615 N.Y.S.2d 828 (Supreme Court, Dutchess Co., 1994), the Hearing Officer relied on confidential testimony from inmate Fosse to convict inmate Scott of assault. The tape of Fosse's testimony, however, was cut off after just two minutes. Since the evidence relied upon by the Hearing Officer was unavailable for judicial review, the court found that the hearing had to be reversed and expunged.

Hearing Reversed Where DOCS Lacked Authority to Open Inmate's Mail

Matter of Tevault v. Goord, Index # 6658-06 (Supreme Court, Albany Co., May 3, 2007) (Unreported Decision)

The Petitioner, an inmate then at Upstate Correctional Facility, mailed a letter to his father in Brooklyn. When the letter arrived in the facility mail room, there was no postage on the envelope. The mail clerk opened the envelope. Inside, she found two letters which

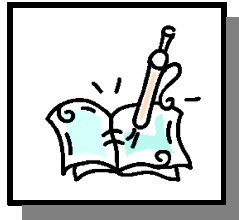
she forwarded to security. Upon inspecting the correspondence, it was determined that one of the letters was written to the Petitioner's father and contained a request that he mail the other letter to a fellow inmate. The Petitioner was thereafter charged with a violation of correspondence procedures and solicitation. Both charges were affirmed and the Petitioner commenced an Article 78 proceeding.

In his Article 78 proceeding, the Petitioner argued that the hearing had to be reversed because the mail clerk had no authority to open his mail. At the hearing, the clerk had testified that when she received the correspondence without postage, she assumed that it would be treated as privileged. However, she found that the addressee was not listed in the New York State Lawyer's Diary and, therefore, she could not treat the correspondence as privileged. She decided to treat it as regular correspondence--which, she testified, she had the authority to open.

The rules regarding outgoing mail are contained in 7 NYCRR § 720.3. Subsection (e) of that rule provides that "[o]utgoing correspondence shall not be opened, inspected, or read without express written authorization from the facility superintendent." Subsection (q) states that outgoing correspondence that does not comply with other provisions of the outgoing mail regulations "will be opened and returned to the inmate."

Here, the court held that returning the correspondence to the inmate may have been an "appropriate procedure...not at odds with the regulations." However, the court went on, "given the explicitly prohibition against opening, inspecting or reading outgoing correspondence without express written authorization from the facility superintendent, and in the absence of some [other] violation of the regulation, the clerk had no authority to open the correspondence." Since DOCS could

not show “reasonable compliance” with the regulations regarding opening inmate correspondence, the hearing was reversed.



Other Cases

Absent Evidence of Dangerousness, Possession of Small Amount of Marijuana Does Not Support Charge of Promoting Prison Contraband in First Degree

People v. Cole, 842 N.Y.S.2d 636
(4th Dep’t 2007)

People v. Finley, 839 N.Y.S.2d 393
(4th Dep’t 2007)

Penal Law § 205.25 provides that a person is guilty of promoting prison contraband in the first degree if he “knowingly and unlawfully introduces any dangerous contraband into a detention facility” or “being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any dangerous contraband.”

“Dangerous Contraband” is defined in Penal Law § 205.00(4) as “contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein.”

In People v. Cole, the Defendant was indicted for promoting prison contraband in the first degree after being found by Correction Officers with what the court described as “a small quantity” of marijuana. He moved to dismiss the indictment, arguing that a small amount of marijuana did not constitute

“dangerous” contraband and that, therefore, he could not be found guilty under this section.

The court, citing past precedent, agreed. Absent specific evidence that the small quantity of marijuana possessed by the Defendant endangered the safety of the facility, the court held, the Defendant could not be indicted under that count.

In People v. Finley, the Defendant was convicted of promoting prison contraband in the first degree, where the evidence showed that, upon being asked for his identification card by a Correction Officer, he threw a wad of toilet paper containing three marijuana cigarettes to the grounds. In his appeal, he argued that the jury erred in convicting him of this count because the small amount of marijuana at issue did not endanger the safety or security of the facility.

The Finley court disagreed. It pointed to evidence provided by a Deputy Inspector General for the Department of Corrections who testified that the Defendant’s possession of marijuana endangered the safety of the correctional facility because, by throwing the marijuana on the ground, he “created a heightened risk that another inmate would attempt to grab the marijuana and that the Correction Officer would then have to chase after the other inmate.” In addition, “the Correction Officer had to turn his back and walk away from defendant in order to retrieve the marijuana that was thrown on the ground, thus creating a heightened risk of injury to the officer” and, by focusing his attention on the Defendant and the marijuana, “the officer was no longer able to supervise the inmates on his block.”

This testimony, held the court, constituted sufficient evidence of dangerousness to uphold the conviction.

Practice pointer: *The court upheld Defendant Cole’s indictment under the lesser charge of promoting prison contraband in the*

second degree, which requires only that the defendant “knowingly and unlawfully make[], obtain[] or possesses any contraband.” See, Penal Law § 205.20

In *People v. Camarena*, 839 N.Y.S.2d 635 (3d Dep’t 2007), the court held that evidence that the Defendant possessed a “sharpened, 6½-inch metal rod” was plainly sufficient for a conviction under promoting prison contraband in the first degree.

Court Upholds DOCS Ban on Smokeless Tobacco

Matter of O’Keefe v. Goord, 843 N.Y.S.2d 193 (3d Dep’t 2007)

The Petitioner, an inmate in SHU, challenged the denial of his grievance requesting smokeless tobacco and the DOCS policy which does not permit its possession and use by SHU inmates. In his petition, he contended that the policy violated SHU inmates’ constitutional rights. The court noted, however, that in *Matter of Malik v. Coughlin*, 550 N.Y.S.2d 219 (3d Dep’t 1990), it had previously upheld the constitutionality of the regulations that the Petitioner challenged with respect to the denial of such items such as a watch, a hairbrush, and personal photographs to SHU inmates.

In *Malik*, the court wrote: “Conditions of confinement are not within the proscription of the Eighth Amendment unless they ‘deprive inmates of the minimal civilized measure of life’s necessities’” or, stated another way, are “‘barbarous’ or ‘shocking to the conscience.’” The denial of a watch, a hairbrush and personal photographs, the court continued, “are the usual incidents of confinement in maximum security... [P]etitioner is not physically injured by [the denial]” and, accordingly, “has failed to establish cruel and unusual conditions and the

directives at issue clearly satisfy the requirements of the Eighth Amendment.”

Here, the court found, without elaboration, that “smokeless tobacco does not warrant a different result.”

The Petitioner also argued that DOCS’ policy prohibiting smokeless tobacco was arbitrary and capricious. To that end, he attempted to link the prohibition against the use of smokeless tobacco by SHU inmates to the 1999 DOCS policy banning indoor smoking in an effort to improve indoor air quality. The Petitioner argued that it was arbitrary and capricious for DOCS to also ban smokeless tobacco, as smokeless tobacco has no effect on indoor air quality.

The court noted, however, that smokeless tobacco was not a permitted item for SHU inmates prior to the implementation of the indoor smoking ban. Consequently, it found his argument “unavailing.”

Court Upholds Constitutionality of Rule Requiring Parole Time Assessment Equal to Minimum Term for Shock Violators

Smith v. Vann, 16 Misc.3d 1132(A) (Supreme Court, Clinton County, Aug. 15, 2007) (Unreported Decision)

DOCS’ Shock Incarceration Program, created in 1987, allows inmates who are accepted into the program to undergo a six-month regimen of “rigorous physical activity, intensive regimentation and discipline and rehabilitation therapy and programming.” Upon successful completion of the program, the inmate becomes eligible to receive a certificate of earned eligibility which, in turn, entitles him or her to apply for parole prior to the expiration of the minimum term.

Under rules established by the Division of Parole, an inmate who has been granted early

parole after completing Shock, who thereafter violates parole and who is not restored to parole, must be given a “time assessment”--*i.e.*, returned to prison--for a period “equal to the minimum period of imprisonment imposed by the court.” 9 NYCRR § 8010.3(a). Moreover, in calculating the length of the time assessment,

the six-month period of shock incarceration shall not be deemed to be a part of the minimum period of imprisonment, and the violator shall therefore not receive credit for that time in calculating the minimum period of re-incarceration. However, the minimum period of re-incarceration shall be reduced by the violator’s pre-commitment jail time and any time spent incarcerated in a State correctional facility other than a shock incarceration facility.

9 NYCRR § 8010.3(b)

The Petitioner in this case commenced his 2- to 6-year sentence on September 30, 2004. He was credited with 29 days of jail time credit. He entered the Shock program on March 14, 2005 and, after completing the program, was paroled on September 15, 2005.

On September 26, 2006, he was declared delinquent and, in accordance with the above rule, the Division of Parole imposed a 2-year time assessment. Pursuant to the rule, the time assessment was credited with the Petitioner’s pre-incarceration jail time, as well as the time he spent in prison outside the Shock Incarceration Program, but it was not credited with the six months he spent in Shock.

The Petitioner sued, arguing that since the time assessment required that he stay in prison beyond his original parole eligibility date without seeing a Parole Board, it was unconstitutional.

The court disagreed, writing:

[T]he petitioner has confused the concept of a minimum period of incarceration of an indeterminate sentence...with [the] delinquent time assessment imposed upon the revocation of parole.

The minimum period of an indeterminate sentence of imprisonment must be imposed by a sentencing court pursuant to Penal Law § 70.00(1) and (3). For most inmates the expiration of the minimum period of imprisonment marks the point at which he or she becomes eligible for release from DOCS custody to parole supervision... For inmates like the petitioner, however, who successfully complete the DOCS shock incarceration program, initial parole eligibility is not necessarily based upon the expiration of his or her minimum period of imprisonment... Thus, following completion of the shock incarceration program, the petitioner was released to parole supervision on September 15, 2005--almost one year earlier than he would have been eligible for parole had he not participated in the program.

[W]hen an inmate is...returned to DOCS custody as a parole violator, the timing of his or her eligibility for re-release to parole supervision is...based upon the expiration of the delinquent time assessment imposed by the Administrative Law Judge upon conclusion of the final parole revocation hearing...In [this] case...petitioner’s delinquent time assessment was imposed by the ALJ...in accordance with the...provisions of 9 NYCRR § 8010.3.

Under these facts, the court continued,

[there is] no basis to conclude that the minimum period of incarceration imposed by the sentencing judge...has been unconstitutionally extended by [the Division of Parole]. Petitioner's minimum period of incarceration has always been two years and it is not disputed that the petitioner has, in fact, completed the minimum period of his incarceration. As a reincarcerated parole violator, however, the petitioner's eligibility for re-release to parole supervision is now contingent on the expiration of the delinquent time assessment imposed by the ALJ at his final hearing.

The court thus found no merit to the Petitioner's position that,

even after his early parole release, following completion of the shock incarceration program, and subsequent return to DOCS custody as a parole violator, the expiration of his minimum period of imprisonment still triggers eligibility for parole release regardless of the delinquent time assessment.

It therefore dismissed his case.

TAC May Not Withhold Good Time Where DOCS Was Unable to Provide Recommended Programing

Matter of Ferrer v. Goord, Index # 1630-07
(Sup Ct., Albany Co., September 11, 2007)
(Unreported Decision)

Good Time, as they say, "is in the nature of a privilege...and no inmate as the right to demand or to require that any good behavior

allowance be granted to him." 7 NYCRR 260.2. The determination to withhold Good Time "is discretionary in nature and, as long as it is made in accordance with the law, it will not be subject to judicial review. Correction Law § 803.

In this case, a Time Allowance Committee recommended that all of the Petitioner's Good Time be withheld "for completion of required ASAT program." "Need [for ASAT] was clearly established," the TAC continued, "in August of 2005...Inmate may reapply to TAC for reconsideration upon successful completion of program." After the recommendation was confirmed by the superintendent, the inmate challenged the decision in an Article 78 proceeding.

The court found that things were not as clear as the TAC implied.

The Petitioner's August 2005 quarterly interview showed that substance abuse treatment was recommended, but it also indicated that the Petitioner had not refused to accept any recommended program. In a memo dated August 17, 2005, his Correction Counselor said only that "a final determination for substance abuse needs will be made" after the Petitioner's evaluation by an Alcohol and Substance Abuse Counselor.

Quarterly interview records over the next year showed the same thing: substance abuse treatment was being recommended and the Petitioner was not refusing to participate in any recommended programming. The record of the February 2006 hearing interview showed that the Petitioner 'disputed' the recommended need for substance abuse programming, and that for May 2006 stated that he 'questioned' the need and, in both instances, the Correction Counselor indicated that he would speak to the Alcohol and Substance Abuse Counselor--although the record contained no evidence that he ever did. In the record of the Petitioner's August 2006 interview, the Correction Counselor wrote: "Acceptable attitude at interview--Still says he

doesn't need ASAT." The interview form continued to show, however, that the Petitioner was not refusing any programming.

In January of 2006, the Petitioner wrote a note to his counselor following their interview in which he said: "As per our discussion; in regards to my program needs you told me you didn't see why ASAT would be a requirement for me. I agree, however if I got to take ASAT refer me to the ASAT people have me interviewed etc. all this way I could knock this program out. If I don't need it let me know. We discussed this at length. So please stay on top of the ball for me."

Under the circumstances, the court found that the record did not support the TAC's conclusion that the need for ASAT was clearly established or that the Petitioner had refused to take it. Thus, the court found, "the question is whether the Department of Correctional Services' failure to timely provide recommended programming is consistent with the statutory purpose and thereby provides a rational basis for withholding good time."

Correction Law § 803(1)(a) provides:

Every person confined in an institution of the department or a facility in the department of mental hygiene serving an indeterminate or determinate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, may receive time allowance against the term or maximum term of his sentence imposed by the

court. Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform

properly in the duties or program assigned.

In withholding the Petitioner's Good Time, the TAC did not rely on the Petitioner's bad behavior or a violation of institutional rules. And, although a refusal to participate in a recommended program has been consistently treated as a failure to perform an assigned program, nothing in the statute provides that Good Time may be withheld based on the failure of DOCS to timely arrange for recommended programming.

The court stated that it was "aware of the benefits of providing certain inmates with relevant therapeutic programming prior to release as well as the budgetary constraints that may impact DOCS' ability to timely meet that need." However, the court went on, "the statute does not authorize respondents to withhold good time on the basis that an inmate has not, for unexplained reasons, completed a recommended program." Such a rule, stated the court

would open the door to wholly arbitrary conduct in that an inmate's ability to be awarded good time could be subject to the whim of those who make program assignments. In the absence of any reasoned explanation as to why a recommended program has not been provided, the determination withhold good time on the basis that

recommended program has not been completed is not in accord with the law and must be set aside.

The court ordered the TAC to reconsider the Petitioner's case under the appropriate statutory guidelines.



Inmate Fails to Prove That Inadequate Security Led to Assault

Vazquez v. State, (NY Court of Claims, July 5, 2007) (Unreported Decision)

The Claimant, an inmate, was assaulted on March 9, 2002 by an unidentified inmate at Elmira Correctional facility. He sued the State, alleging that the assault was due to inadequate staffing and negligent supervision at Elmira Correctional Facility.

The facts were as follows:

The Claimant had been housed at Elmira for approximately 12 days before the incident, although he had previously been incarcerated at Elmira for approximately 12 years during the course of his sentence. When he was admitted to Elmira, he advised facility officers that he had no known enemies.

At the time of the assault, he was seated in the bleachers near the televisions at the basketball court located in Elmira's gym. An allegedly unknown assailant with two accomplices crossed the gym, went up the stairs into the bleachers, and slashed his face with a razor blade.

According to testimony and evidence at trial, ten officers would routinely be assigned to the gym area: One officer would be assigned to the COs' office; one to the observation booth, which overlooks both the gym and the gym yard; two to a desk in the shower/telephone area; four officers would normally be assigned to posts outside in the gym yard; and two would be in "roving posts" on the gym floor.

There were 157 inmates in the gym area at the time of the incident but it was unclear how many were in the gym and how many were outside, in the gym yard.

CO Cardinale testified that he was on duty in the shower area at the time of the incident. He became aware that there was a problem when an inmate caught his attention and

gestured toward the bathroom. He went into the bathroom and found the Claimant kneeling on the floor in front of a toilet, apparently washing his face in the toilet. Cardinale told him to get up. When the Claimant complied, he held a piece of cloth to his face and turned his head away from Cardinale. When Cardinale told him to remove it, he saw that the Claimant was injured and took him to the medical area of the facility. He testified that he believed eight to ten officers were assigned to the gym area that day. He said he did not know how many of those officers were actually in the gym at the time of the assault, nor did he know how many inmates were in the gym.

A videotape of the gym at the time of the assault did not show the actual assault (which occurred out of the field of view of the camera), but it did show three individuals walking across the gym floor toward the stairs where the Claimant was seated in the bleachers. The time stamp on the tape indicates that this occurred at 1:59:17 p.m.. At 1:59:42 p.m., a Correction Sergeant is seen on the tape exiting the COs' office and walking out the gym door to the gym yard. At 2:00:09 p.m., the tape shows the Claimant exiting the staircase to the bleachers holding something to his face as he walked into the bathroom area. The Claimant testified that he looked around the gym area for a CO after he was attacked, but did not see one, so he went into the bathroom to clean the blood off his face. While individuals appearing to be COs entered and exited the security office during the course of the video, it was impossible to determine from the video whether any officers were on the floor of the gym outside the range of the camera.

Robert DeRosa, a former Warden of the Anna M. Kross Detention Center for Men at Rikers Island, testified as a corrections expert on behalf of the Claimant.

DeRosa testified that, in his opinion, DOCS' operation of the gym area at Elmira was not

consistent with the general principles of penology. In his view, because the officers assigned to the gym floor were not assigned to specific locations, but instead to a “roving patrol,” it was impossible for them to fulfill their duties regarding the care, custody, and control of the inmates, and it was further impossible for the officers to respond effectively in an emergency situation. He said that at one point on the videotape (at approximately 1:15 p.m., nearly 45 minutes prior to the assault), it appeared that there were 11 Correction Officers located in the security office. In his opinion, that continuous flow of officers into the office indicated that security was not being effectively provided, and he believed that rather than being on a “roving patrol,” the officers should have been located at designated posts in the gym. He further stated that his review of the videotape indicated that the Supervising Officer was not making regular rounds to observe and enforce the levels of supervision designated for those officers at any particular time. He also testified that DOCS’ records show that recreation areas constitute the second most frequent location for inmate-on-inmate assault (the first being the cell blocks), and that Elmira had a relatively high incidence of such assaults among the State’s maximum security facilities. Further, in his opinion, a CO should have been stationed in the bleachers.

Superintendent John Burge, Sr., the current Superintendent at Elmira, testified as an expert in the field of penology on behalf of the Defendant. Burge stated that DOCS’ central office in Albany establishes guidelines regarding staffing, and that the facility is given a “plot plan” that specifies staffing by shifts. In his opinion, there was adequate staffing in the gym on the day and time the Claimant was assaulted, but he conceded on cross-examination that he had no personal

knowledge of whether the various posts were staffed according to the directives.

Under these facts, the court found that the Claimant had failed to establish that there was inadequate security in the gym. Although he tried to prove that there were no guards on the gym floor at the time of the incident, that assertion was supported only by the facts that the videotape showed no COs on the floor of the gym and by the Claimant’s own testimony. The videotape, however, did not show the whole gym floor and the court rejected the Claimant’s testimony as self-serving and not credible, given that he had apparently tried to conceal his injury from prison officials immediately after the assault. “Because claimant’s testimony was the only basis (given the limited view of the gym floor provided by the camera) for a potential finding that there were no officers on the gym floor, claimant’s theory—that defendant had constructive notice that an attack would be reasonably foreseeable, given the lack of supervision—must fail.”

Practice Pointer: Courts have held that the State must provide inmates with “reasonable protection against foreseeable risks of attack by other inmates.” *Blake v. State of New York*, 259 A.D.2d 878 (1999). However, courts have continued to hold that the State is not the insurer of inmates’ safety and the mere fact that an assault occurs does not mean that it was foreseeable or give rise to the inference that the State has been negligent. *Sebastiano v. State of New York*, 112 A.D.2d 562 (1985). In order to establish that the State is liable for an assault, an inmate must prove that the State knew or should have known that there was a risk of harm to the Claimant which was reasonably foreseeable and which the State could have prevented. *Sanchez v. State of New York*, 99 N.Y.2d 247, 253 (2002).

In practice, this rule has meant that the State has been held liable for an inmate assault in only three circumstances: when, 1) the State

knew the victim was at risk of assault and failed to take reasonable steps to protect him; 2) the State knew the assailant was dangerous, but failed to protect other inmates from him; or 3) the State had notice that an assault was likely to occur and an opportunity to intervene to protect the victim, but failed to do so. Courts have consistently rejected claims alleging that a mere absence of supervision made an assault foreseeable. See e.g., Colon v. State of New York, 620 N.Y.S.2d 1015 (3d Dep't 1994).

In Sanchez, supra, the Court of Appeals appeared to open the door to lawsuits based on a lack of supervision. In that case, as here, there was no evidence that DOCS was on notice that an assault was likely to occur, or that the assailant was particularly dangerous, or that the Claimant was particularly at risk. The Claimant, however, presented evidence, similar to the evidence presented in this case, that DOCS should have known that the limited supervision provided in the area where the assault occurred would lead to an increased risk of assault and that the assault was therefore foreseeable. The Court returned the case to the lower court for further consideration of this argument.

Since Sanchez, however, no court--including the court that reconsidered the Sanchez case--has held DOCS liable for an inmate assault on the grounds of lack of supervision. Furthermore, as this case demonstrates, it appears that the bar to doing so remains a formidable one.

Pro Se Practice

Deferring Payment of Mandatory Fees

A felony conviction can be costly. New York State law provides that all felony convictions be accompanied by a \$250

mandatory surcharge and a \$20 Crime Victim Assistance Fee. Many convicts are also charged a \$50 DNA Databank Fee. Sex offenders may have to pay a \$50 Sex Offender Registration Fee and a \$1,000 "Supplemental Sex Offender Victim Fee." In 1995, the Legislature amended the Criminal Procedure Law to eliminate the authority of the sentencing court to waive the fees. Furthermore, under Penal Law § 60.35, the superintendent of a correctional facility is authorized to collect unpaid fees directly from your inmate account.

Such fees can be a particularly onerous burden for indigent inmates earning only prison wages. In some cases, however, it may be possible to defer the payment of the fees until after incarceration.

Under Criminal Procedure Law § 420.40, a court may defer a fee or surcharge upon a finding that its immediate imposition would work "an unreasonable hardship on the [defendant] or his or her immediate family." The statute goes on to provide a procedure pursuant to which the court can hold a hearing to determine whether the fees should be deferred.

Until recently, there was a dispute over whether this provision applied to inmates. This is because the statute states that a court cannot issue a summons for a hearing to "[any] person who is being sentenced to a term of confinement...in the department of correctional services." Several courts had interpreted that language to mean that fee deferral was unavailable to DOCS inmates.

There is an emerging consensus, however, that the statute does apply to inmates. This is because, although it prohibits the court from issuing a summons to an inmate, it also states that inmates' fees "shall be governed by Criminal Procedure Law § 60.30."

Criminal Procedure Law § 60.30, in turn, contains no limits on a court's discretion to issue an order deferring fees.

Thus, in People v. Kistner, 736 N.Y.S.2d 924 (4th Dep't 2002), a case involving a Defendant serving a two-year state prison sentence, the Fourth Department of the Appellate Division concluded that a lower court had "erred in determining that it lacked authority pursuant to CPL 420.40(2) to defer the mandatory surcharge."

In People v. Camacho, 771 N.Y.S.2d 481 (4th Dep't 2004), *lv. den.* 2 NY3d 761 (2004), a case involving an inmate serving a 1½- to 3-year sentence, the court reaffirmed its view that "a [sentencing] court has the authority to defer the mandatory surcharge."

Also, People v. Huggins, 685 N.Y.S.2d 881 (Sup. Ct., Greene Co., Jan. 20, 1999), the court held that fee deferral is "within the court's discretionary authority provided by Criminal Procedure Law § 60.30."

To apply for a fee deferral, you direct a motion to your sentencing court and serve it on the District Attorney. You should include an affidavit stating why you believe the immediate imposition of the fees is "work[ing] an unreasonable hardship [on you] over and above the ordinary hardship suffered by other indigent inmates" (People v. Kistner, *supra*), and you should ask that the fee be deferred until some reasonable period after your incarceration has been completed.

If granted, the motion should prevent DOCS from collecting your fee from your inmate account during incarceration. See Huggins, *supra* ("Where there has been entered, even retrospectively, a discretionary deferral pursuant to Penal Law § 60.30...prison officials have no authority thereafter to seize an inmate's funds in derogation of the sentencing court's order.").

Second Circuit Offers Primer on Deliberate Indifference

Among the most frequent types of lawsuits brought by inmates in federal court are those

concerning claims of inadequate medical care. They are also among the most difficult and the most misunderstood. This is in part because, in order to rise to the level of a federal claim, it is not enough that DOCS' medical care be inadequate, or even that it constitute malpractice. It must, instead, be "deliberately indifferent."

Many inmates are familiar with the phrase "deliberate indifference," and many of them, dissatisfied with the medical care they are receiving from DOCS, are certain that their care rises to the "deliberate indifference" standard. Few, however, can state with precision just what it means to be "deliberately indifferent."

This is by no means the inmates' fault. In fact, Federal courts have wrestled for years with exactly what it means to be "deliberately indifferent" to inmates' medical needs. The answer they have arrived at is neither brief nor easy to summarize.

In Salahuddin v. Goord, 467 F.3d 263 (2d Cir. 2006), the Second Circuit Court of Appeals, the federal appeals court with jurisdiction over New York, found that not even the lawyers arguing the case were describing the deliberate indifference standard correctly. The Court tried to boil it down to just a few paragraphs:

The Cruel and Unusual Punishments Clause of the Eighth Amendment imposes a duty upon prison officials to ensure that inmates receive adequate medical care. Yet not every lapse in medical care is a constitutional wrong. Rather, "a prison official violates the Eighth Amendment only when two requirements are met."

The first requirement is objective: the alleged deprivation of adequate medical care must be "sufficiently serious." Only "deprivations of medical care which deny the minimal civilized

measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."

Determining whether a deprivation meets the objective standard entails two inquiries. The first is whether the prisoner was actually deprived of adequate medical care. A prison official is only required to provide reasonable care. Thus, prison officials who act reasonably in response to an inmate-health risk cannot be found liable under the Cruel and Unusual Punishments Clause. However, failing "to take reasonable measures" in response to a medical condition can lead to liability.

The second inquiry asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner. For example, if the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious. Factors relevant to the seriousness of a medical condition include whether "a reasonable doctor or patient would find [it] important and worthy of comment," whether the condition "significantly affects an individual's daily activities," and whether the condition causes "chronic and substantial pain." In cases where the inadequacy is in the medical treatment given, the seriousness inquiry is narrower. For example, if the prisoner is receiving on-going treatment and the offending conduct is an unreasonable delay or interruption in that treatment,

the seriousness inquiry "focus[es] on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone."

The second requirement for an Eighth Amendment violation is subjective: the charged official must act with a sufficiently culpable state of mind. The Supreme Court has held that "some mental element must be attributed to the inflicting officer" before the harm inflicted can qualify as "punishment" under the Eighth Amendment. In medical treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health. Deliberate indifference is a mental state equivalent to recklessness, as the term is used in criminal law. This mental state requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result. Although less blameworthy than harmful action taken intentionally and knowingly, action taken with reckless indifference is no less actionable. The reckless official need not desire to cause such harm or be aware that such harm will surely or almost certainly result. Rather, proof of awareness of a substantial risk of the harm suffices. But recklessness entails more than mere negligence; the risk of harm must be substantial and the official's actions more than merely negligent.

Clear? In case not, the editors of *Pro Se* attempt their own summary of the court's summary below:

- ➔ Deliberate indifference has two elements.
 - ▶ The first element is an “objective” element.
 - ▶ Under the “objective” element, courts ask two questions:
 1. Were you deprived of adequate medical care? That is, was your medical care “reasonable” or “unreasonable”? Only care that is “unreasonable” will meet the deliberate indifference standard.
 2. Was the condition for which you received inadequate treatment “sufficiently serious”? That is, was it “important”? Would a reasonable doctor have found it “worthy of comment”? Did it significantly affect your daily activities? Did it cause you “chronic and substantial pain”?
 - The second element is a “subjective” element.
 - Under the subjective element, courts ask whether the defendant was “aware” that the treatment he was providing, or failing to provide, carried a substantial risk of harm. Only an official who acted “recklessly”—that is, who knew or should have known that the care he/she was providing was unreasonable, can be held liable under the deliberate indifference standard.
 - Only if you can meet both the objective *and* subjective prongs of the deliberate indifference standard do you have a case that you can bring to federal court.

In Salahuddin, the court applied this standard to a set of facts which typify many of

the kinds of problems inmates encounter with DOCS’ medical system.

The Plaintiff in Salahuddin was diagnosed with Hepatitis C in the Fall of 2000, while in custody at Woodbourne. At year’s end, a doctor at Woodbourne informed him that he would have to undergo a liver biopsy for the medical staff to determine the correct course of treatment. The biopsy was delayed for several months, due to a series of events. First, the Plaintiff was in SHU; he was then transferred to Eastern Correctional Facility, then to Downstate Correctional Facility, then to Auburn, and finally to Lakeview. Then, sometime in February or March 2001, a physician at Lakeview canceled the biopsy because Salahuddin was eligible for parole within the next twelve months. The physician believed this decision was mandated by the then-existent [since modified] DOCS Hepatitis C Primary Care Practice Guideline, a DOCS-wide policy promulgated by Dr. Lester Wright, the DOCS Chief Medical Officer.

On the day before Salahuddin’s July 2001 parole hearing, Dr. Wright intervened and approved Salahuddin for a liver biopsy. After being denied parole, Salahuddin received the liver biopsy in or around December 2001. After spending several months on a national waiting list for a new medication, a physician at Attica canceled his medication because Salahuddin then had less than twelve months remaining until his *next* Parole Board hearing. In December 2002, Dr. Wright intervened again and ordered expedited delivery of the medicine, which Salahuddin began receiving in January 2003.

During the more than two years between his diagnosis and his eventual receipt of medication, Salahuddin complained to various prison officials and medical personnel about stomach pain, digestive problems, fever, chronic diarrhea, fatigue, and other maladies.

Salahuddin sued, among others, Dr. Piazza, for cancelling his liver biopsy. The question before the court: Could Dr. Piazza be held liable under the deliberate indifference standard?

The court first addressed Dr. Piazza's cancellation of the liver biopsy.

Applying the first prong of the deliberate indifference test, the court found that it was "objectively unreasonable" for Dr. Piazza to have cancelled the biopsy. First, the court held that it could not, as a matter of law, "find it reasonable for a prison official to postpone for five months a course of treatment for an inmate's Hepatitis C because of the possibility of parole" without at least some individualized assessment of the likelihood that the inmate would be denied parole. Second, because Salahuddin claimed that the delay in his biopsy caused him to suffer serious pain between the time the biopsy was cancelled by the Dr. Piazza and the time it was re-instated by Dr. Wright, and because the Defendant did not rebut that claim, the court found that the unreasonable conduct was "sufficiently serious" to support deliberate indifference.

Addressing the second prong of the deliberate indifference standard, however, the court found no evidence upon which to base a conclusion that Dr. Piazza had acted "recklessly" or that he knew or should have known that his conduct created a serious risk to Salahuddin. On the contrary, the record contained a letter from Dr. Piazza to the facility Superintendent, written in response to a grievance filed by Salahuddin, in which Dr. Piazza stated his belief that because Hepatitis C leads to liver damage only over 20 to 30 years, Salahuddin was "in no immediate danger" and that "[f]rom a medical standpoint, there is no urgency for [the liver biopsy]."

The court found: "This may have been an unsound conclusion...but, as we have discussed, the mental-state inquiry does not

include an objective-reasonableness test. Piazza's letter is direct evidence that he was not aware of a substantial risk that postponing the liver biopsy would cause serious harm."

As a result, Dr. Piazza could not be found liable under the deliberate indifference standard and Salahuddin's case was dismissed.

Practice pointer: *Dr. Piazza's actions might have been negligent; however, mere negligence does not rise to a federal claim under the deliberate indifference standard. "A [prisoner's] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Likewise, an inmate's mere disagreement over the proper treatment does not create a constitutional claim. "So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation." Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir.1998).*

Do these rules mean that inmates are entirely without remedy if DOCS' medical treatment is negligent, or constitutes malpractice, but still does not rise to the level of deliberate indifference? No. It simply means that you do not have a federal claim and therefore can not sue in federal court. You could still sue the State in the State Court of Claims.

Maximizing Chances for Early Release: The Earned Eligibility Certificate and Related Programs

Inmates often want to know what they can do to minimize their time in custody. This article provides an overview of the Earned Eligibility Program and its counterparts, the

Presumptive Release, Merit Time Release, and Additional Merit Time Release programs, all of which provide keys to early release.

What Is the Earned Eligibility Program?

The Earned Eligibility Program (“EEP”) is the process by which DOCS assigns inmates to treatment and/or work programs and then determines if inmates have complied with assigned programs. Those who successfully complete assigned programs are awarded an Earned Eligibility Program certificate (“EEP certificate”). In conjunction with the following programs, the EEP certificate can help you reduce the amount of time you spend in DOCS custody:

1) *Parole:*

If you have a minimum sentence of not more than 8 years, you can use an EEP certificate to significantly increase your chances of being paroled. Under Corrections Law § 805, the Parole Board applies a more relaxed standard when determining parole applications for such inmates, and will grant the application “unless the board determines that there is a reasonable probability that, if the inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society.” As discussed more below, parole is granted far more often under this relaxed standard.

2) *Presumptive Release:*

As described in Corrections Law § 806 and DOCS Directive 4791, Presumptive Release allows inmates convicted of certain non-violent felonies to be released by the Commissioner of DOCS at their Merit Time or parole eligibility dates without having to appear before the Parole Board for a parole release hearing. DOCS

makes decisions about Presumptive Release, not the Parole Board. If DOCS grants you Presumptive Release, you are released without appearing before the Parole Board for a hearing; you appear only to sign the conditions of release. If denied, you must appear before the Parole Board to be considered for release. In general, inmates are not eligible for Presumptive Release if they have committed certain felonies (listed in Directive 4971, Section III, B) or if they have been found guilty of a serious disciplinary infraction (as defined in Directive 4971, Section III, C). In addition, inmates must successfully participate in assigned programs and be awarded an EEP certificate to be eligible for presumptive release. You should carefully read Directive 4791 to determine if you meet the eligibility requirements.

3) *Merit Time Release:*

As described in Corrections Law §§ 803, 806 and Directive 4790, Merit Time Release allows inmates convicted of certain non-violent felonies to be eligible for parole before their regular parole or Conditional Release dates. In general, to obtain Merit Time Release: you cannot have been convicted of certain felonies (listed in Directive 4790, Section II, A); you cannot have been found guilty of a serious disciplinary infraction (as defined in Directive 4790, Section II, B); and you must successfully perform your recommended program requirements. In addition, you must accomplish at least *one* of the following:

- i) get a GED;
- ii) get an alcohol and substance abuse treatment certificate;
- iii) get a vocational trade certificate following at least 6 months of programming; or

- iv) perform at least 400 hours of community service as part of a community work crew.

DOCS determines whether you will be eligible for Merit Time Release; if so, you get to appear before the Parole Board for your merit release before your regular parole release date. (But see above: if you also qualify for Presumptive Release, you could be released without having to appear before the Parole Board).

The benefits of Merit Time can be significant for both indeterminate and determinate sentences, as described below:

Merit Release for Indeterminate Sentences:

Unlike Good Time, which reduces your maximum sentence, Merit Time reduces your *minimum* sentence. If you are serving an indeterminate sentence and have earned Merit Time, you will be eligible for release after serving only 5/6ths of your minimum sentence; if you are convicted of a class A-I violent drug offense, you will be eligible for release after serving only 2/3 of your minimum sentence. So, for example, an inmate serving an indeterminate sentence of 15 years to life for Criminal Sale of a Controlled Substance in the First Degree (an A-I felony) is eligible for Merit Time Release after serving 10 years; he is never eligible for Conditional Release. An inmate serving an indeterminate 6- to 12-year sentence for Forgery in the First Degree is eligible for Merit Time Release after 5 years (5/6 of 6), and Conditional Release after 8 years (2/3 of 12).

Merit Release for Determinate Sentences:

For determinate sentences, you will be eligible for Merit Time release after serving only 5/7 of your sentence (as compared to Conditional Release, which is not granted until you have served 6/7 of your determinate

sentence). By way of example, an inmate serving a determinate term of 14 years for First Degree Criminal Possession of a Controlled Substance is eligible for Merit Release after serving 10 years (5/7 of 14), while he must serve at least 12 years (6/7 of 14) to be eligible for Conditional Release.

4) *Supplemental Merit Time:*

As part of the 2004 Drug Law Reform, the Legislature provided for additional Merit Time for certain drug offenders, which DOCS calls “supplemental” Merit Time. Supplemental Merit Time is only applicable to indeterminate drug offense sentences and does not apply to A-I drug offense sentences. Found in § 30(1) of Chapter 738 of the Laws of 2004, this provision, which has not been codified (meaning that you cannot find it in any statute), provides as follows:

Notwithstanding any contrary provision of law, any person convicted of a felony defined in Article 200 or 221 of the penal law, other than a Class A-I felony offense defined in Article-220 of the penal law, which was committed prior to the effective date of this section, and sentenced thereon to an indeterminate term of imprisonment pursuant to provisions of the law in effect prior to the effective date of this section and who meets the eligibility requirements of paragraph (d) of Subdivision 1 of § 803 of the correction law as it exists on the effective date of this section, may receive an additional merit time allowance not to exceed one-sixth of the minimum term or period imposed by the court provided the inmate either: (i) successfully participates or has participated in two or more of the four program objectives set forth in

Paragraph (d) of Subdivision 1 of § 803 of the correction law, or (ii) successfully participants in one of the program objectives set forth in Paragraph (d) of Subdivision 1 of § 803 of the correction law and successfully maintains employment while in a work release program for a period of not less than three months.

Put simply, eligible inmates can earn supplemental Merit Time by successfully participating in assigned work and treatment programs pursuant to Correctional Law § 805, *and* either 1) successfully completing two or more of the four programs required for Merit Time, or 2) successfully completing one of the programs required for Merit Time and successfully maintaining employment in a work release program or any other continuous temporary release program for at least 3 months. See Directive 4790, Section III, A, 2, and Directive 4791, Section IV, B for these criteria.

Again, the benefits are significant. With supplemental Merit Time, the minimum term is reduced by 1/6--in addition to the 1/6 reduction for merit time--thus providing for a total reduction of 1/3 (2/6) of the minimum. For example, an inmate serving a 12- to 24-year sentence for Criminal Possession of a Controlled Substance in the Third Degree who has earned additional merit time is eligible for discretionary parole release at his Supplemental Merit Board after serving 8 years (1/3 off of 12) and to Merit Time release after serving 10 years (1/6 off of 12). Another way of saying this is that a person who earns additional Merit Time goes to his Supplemental Merit Board after serving 2/3 of his minimum. A person earning only merit time goes to his Merit Board after serving 5/6 of his minimum. In comparison, without any Merit Time, he must serve 12 years for parole eligibility and 16 years for Conditional Release eligibility.

Does Getting an EEP Certificate Really Make a Difference?

There is no question: Getting an EEP certificate can make a significant difference in the amount of time you spend in DOCS custody. This works in two possible ways. First, getting an EEP certificate may allow you to be released at your merit eligibility date or supplemental merit eligibility date through Presumptive Release--without having to appear before the Parole Board (except to sign conditions of release).

However, the EEP certificate will help you even if you do not meet the requirements for the Presumptive Release and must appear before the Board. According to data collected by DOCS, having an EEP certificate significantly increases the chances of getting parole. Between October 2005 and March 2006, the Parole Board issued decisions for 7,310 inmates. Of these, 5,582 had earned their EEP certificates, 1,125 had been denied, and 663 were considered "non-certifiable." (The reasons for this "non-certifiable" status are explained below.) The Board granted parole to 54%--well over half--of those inmates who had EEP certificates. In contrast, the Board granted parole to only 24%--less than a quarter--of those inmates who had been denied EEP certificates. The non-certifiable group fared slightly better than the denied group: 35% of this group were granted parole.

What Are Common Reasons Inmates Fail to Earn EEP Certificates?

Since getting an EEP certificate can make such a significant difference in your chance of being released, it is important that you understand the obstacles you may face. As stated above, between October 2005 and March 2006, DOCS denied EEP certificates to 1,125 inmates. Most of these inmates (63%)

were denied because their poor disciplinary record interfered with their programming. An additional 46% of the inmates were denied either because they had poor program participation and progress, or because their program attendance was unacceptable. Finally, 8% were denied EEP certificates because of their outright refusal to participate in recommended programs.

What is the standard by which “poor institutional behavior as it has impacted on your progress and participation and/or that of other inmates in programs” is measured? Clearly, it is a subjective standard and it is in your best interest to avoid receiving a misbehavior report. DOCS does, however, apply a working standard. One thing to be aware of is that, in applying this standard, DOCS looks at your institutional behavior during your entire period of confinement, not just between Parole Board appearances. A rule of thumb that will likely lead to a denial of an EEP certificate is if poor institutional behavior has taken you out of prison programming for over 25% of the time you have been incarcerated. Frequent keeplocks and SHU time early in your incarceration can cause difficulties in obtaining an EEP certificate later on, even though you have been ticket-free in recent years. When you first arrive in DOCS and release seems so far away, critical thinking about your disciplinary record is important.

A minority of inmates are neither granted nor denied EEP certificates; instead, DOCS deems these inmates to be “non-certifiable.” Most of the time, this is because these inmates have not been in a program long enough for DOCS to measure their level of participation. Inmates still in reception are also considered “non-certifiable.” Other reasons for “non-certifiable” status include time out of the facility for court appearances, time spent in the hospital or infirmary, and time spent in protective custody.

How Might the Above Information Impact Your Decision-Making?

You should certainly consider the above information in making decisions about behavior that could result in a disciplinary infraction (or even spending time with other inmates who are prone to getting disciplinary tickets). As the above reveals, a poor disciplinary record is the reason cited most often in denying EEP certificates.

The above information should play a role in other decision-making. For example, you might be thinking about asking for placement in Protective Custody (PC). If so, you should remember that while placement in PC might address your security concerns, it might also result in you getting a “non-certifiable” status, which in turn prevents you from getting an EEP certificate.

Conclusion

A thorough understanding of the Earned Eligibility Program, Presumptive Release, Merit Time, and Supplemental Merit Time Release may help you make important decisions about the goals you can realistically achieve and the steps you must take to achieve these goals. Being aware of these programs may result in you significantly reducing the amount of time you spend in custody. To help you understand these programs you should read Corrections Law §§ 803, 805, and 806, as well as Directives 4790 and 4791.



Subscribe to Pro Se!

Pro Se accepts individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered directly to you via the facility correspondence program. To subscribe, send a subscription request with your name, DIN number, and facility to *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

Pro Se Wants to Hear From You!

Pro Se wants your opinion. Send your comments, questions, or suggestions about the contents of *Pro Se* to *Pro Se*, 301 South Allen Street, Albany, NY 12208. Do not send requests for legal representation to *Pro Se*. Requests for legal representation and all other problems should be sent to Central Intake, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850.

EDITORS: JOEL LANDAU, ESQ.; KAREN MURTAGH-MONKS, ESQ.

COPY EDITING: FRANCES GOLDBERG

CONTRIBUTORS: PATRICIA WARTH, ESQ.;

ALAN ROSENTHAL, ESQ.

PRODUCTION: FRANCES GOLDBERG

DISTRIBUTION: BETH HARDESTY

Pro Se is printed and distributed free through grants from the New York State Bar Foundation and the Tompkins County Bar Association.